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In the Supreme Court of the United States

OCTOBER TERM, 1968.

No. 496

MARIA GORUN and PARASCHIVA GIURGIU,
on behalf of themselves, and all others similarly situated,
Appellants,

vs.

VICTOR H. FALL and LESTER H. LOBLE, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA.

JURISDICTIONAL STATEMENT.

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In the Supreme Court of the United States

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MARIA GORUN and PARASCHIVA GIURGIU,
on behalf of themselves, and all others similarly situated,
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vs.

VICTOR H. FALL and LESTER H. LOBLE, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA.

JURISDICTIONAL STATEMENT.

Appellants appeal from the final order and judgment of the United States District Court for the District of Montana, entered on August 6, 1968, denying the plaintiffs' motion for summary judgment, granting defendants' motion to dismiss and dismissing the complaint in this cause, and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW.

The opinion of the District Court for the District of Montana is unreported, and is attached hereto as Appendix A.

JURISDICTION.

This suit was brought under 28 U. S. C. Section 2281, as a class suit pursuant to Rule 23(a) of the Federal Rules of Civil Procedure, to challenge the constitutionality and to enjoin the enforcement of Section 91-520, Revised Codes of Montana, 1947, as amended. The judgment of the District Court was entered on August 6, 1968, and notice of appeal was filed in that court on August 14, 1968. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1253 and 2101 (b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Toomer v. Witsell*, 334 U. S. 385; *St. John v. Wisconsin Employment Relations Board*, 340 U. S. 441; *Ferguson v. Skrupa*, 372 U. S. 726.

QUESTIONS PRESENTED.

1. Whether Montana's so-called "Iron Curtain" statute, Section 91-520, is unconstitutional?

2. Whether the actions of the Federal Government in amending its regulations (Treasury Department Circular No. 655, as amended) so as to delete Romania from the list of restricted areas to which the transmittal of public funds is prohibited, and, thereafter releasing blocked funds and assets belonging to Romanian nationals, preclude Montana from applying Section 91-520, Revised Code of Montana 1947, as amended, to the succession rights of residents and nationals of Romania?

STATUTES INVOLVED.

Revised Codes of Montana, 1947, Section 91-520, as amended, included in Appendices A and C, and Title 31, Section 211.3(a); Title 8, Section 511, C. F. R., 25 Federal Regulations 3458, 3526, set forth in Appendix B hereto.

STATEMENT.

Appellants are heirs and legatees of John Precup Giurgiu who died testate in Montana on June 22, 1966, and they are residents of Romania. Appellants will inherit from that estate unless prevented by the provisions of Revised Code of Montana, 1947, Section 91-520, as amended.

Appellants filed a class action (Appendix C), under Rule 23 on their own behalf and on behalf of all other residents of Romania similarly situated. Their complaint seeks a judgment that Section 91-520 of the Montana laws violates the Constitution of the United States, and also an injunction restraining the judges of the Probate Court wherein the estate is being administered and the State Treasurer, appellees herein, from applying and enforcing it.

As a result of the decisions of this Court in *Zschernig v. Miller,* 389 U. S. 429, and *Goldstein v. Cox,* 389 U. S. 581, appellants filed a Motion for Summary Judgment with Affidavit on the authority of these cases (Appendix D). The three judge District Court denied the motion for summary judgment, granted appellees motion to dismiss and dismissed the complaint of the appellants.

THE QUESTIONS ARE SUBSTANTIAL.

The issues involved in this appeal are similar to those raised in *Zschernig* and *Goldstein.* These issues are of importance in the area of foreign affairs and international developments.

1. The Montana statute provides for withholding of the inheritance in trust and ultimate escheat in cases where a non resident alien claims money or property unless two requirements are fulfilled:

(a) the reciprocal right of United States citizens to inherit property left by a deceased person in such foreign country; and

(b) the movement of money or property out of such foreign country to an heir, devisee and/or legatee in the United States without restriction by the foreign country.

These two provisions, identical in substance and essence, are found in the Oregon statute which was declared constitutionally invalid in *Zschernig*.

The three judge court in this case stated, however, that *Zschernig* did not overrule *Clarke v. Allen*, 331 U. S. 503, which "sustained the validity of a California reciprocity statute." The court below admitted, nevertheless, that *Zschernig* "* * * did hold that an Oregon statute as applied had potential for the disruption or embarrassment of our relations with other countries, intruded upon a federal function and was therefore unconstitutional." Nevertheless, the court went on to decide that the Montana statute may be applied in a manner which would not be "offensive to the Federal Constitution." The distinction is untenable. We believe that the conclusions to be drawn from *Zschernig* indicate clearly that statutory restrictions as contained in the Montana statute here under attack constitute an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress. In this respect, this Court stated:

> "* * * Yet, such forbidden state activity * * * has infected *each* of the three provisions of Section 111.070, as applied by Oregon." (Emphasis ours.)

This Court concluded that the application of the Oregon statute and similar statutes results in an unconstitutional involvement by the state in foreign affairs.

We submit that the Montana statute cannot be applied effectively without involving the Montana courts in the kind of foreign relations activities proscribed by the *Zschernig* decision. The declarations of Mr. Justice Stewart, in his concurring opinion in *Zschernig,* in which he was joined by Mr. Justice Brennan, are extremely appropriate. He stated, pertinent hereto, as follows:

> "I believe that all three of the statutory requirements on their face are contrary to the Constitution of the United States. In my view, *each* of the three provisions of the Oregon law suffers from the same fatal infirmity. *All three launch the State upon a prohibited voyage into a domain of exclusively federal competence.* Any realistic attempt to apply any of the three criteria would necessarily involve the Oregon courts in an evaluation, either expressed or implied, of the administration of foreign law, the credibility of foreign diplomatic statements, and the policies of foreign governments. Of course, state courts must routinely construe foreign law in the resolution of controversies properly before them, *but here the courts of Oregon are thrust into these inquiries only because the Oregon legislature has framed its inheritance laws to the prejudice of nations whose policies it disapproves and thus has trespassed upon an area where the Constitution contemplates that only the National Government shall operate."* (Emphasis supplied.)
>
> A substitution of Montana in the place of Oregon in the foregoing declaration readily reveals that the Montana statute "suffers from the same fatal infirmity."

The controlling effect of *Zschernig* regarding similar statutes is evidenced by recent state court decisions; *Estate of Harry Kurt Kraemer,* decided June 5, 1968, Superior Court of Los Angeles County, Probate Division, *Estate of Semen Struckmanczuk,* decided April 17, 1968,

Orphans' Court of Philadelphia County, Pennsylvania, and *Estate of Esther Kish*, Supreme Court of New Jersey, A-152, September Term 1967, decided July 31, 1968.

2. The action of the Federal Government in concluding the Financial Agreement of 1960 with Romania, and the consequent amendment of Treasury Department Circular 655, permitting the transmittal of public funds to Romania, forbids Montana from limiting or in any way proscribing the right of a resident in or national of Romania to receive the proceeds of a Montana estate.

Admittedly, the inclusion or removal of a foreign government from the Treasury List of the United States (Circular 655, 31 C. F. R. 211.3), is a political determination involving the conduct of our foreign affairs. This has been evidenced, once again, by the recent action of our Federal Government whereby Treasury Circular 655 was amended to remove the country of Czechoslovakia therefrom. The amendment to the federal regulation accomplishing this action contains the explicit statement, as follows: "* * * the amendment involves a foreign affairs function of the United States" (Federal Register, June 25, 1968, Volume 33, Number 123, pp. 9302, 9303—Appendix E annexed hereto).

That the action of the Federal Government in concluding the Financial Agreement of 1960 with Romania constitutes new foreign policy with relation to that country is clear. Agreements entered into by our government have the same force and effect and attain the same stature as treaties in the formulation of foreign policy. In view of this agreement, the Secretary of the Treasury of the United States determined that residents and nationals of Romania would have the use, benefit or control of money transmitted to them from the United States. This determination by the Executive Department of the United States

overrides any conflicting determination that the courts of Montana may seek to make pursuant to the policy of the state as set forth in Section 91-520 of the Revised Codes of Montana. With regard hereto, this Court, in *Kolovrat v. Oregon,* 366 U. S. 187 (1961), declared:

> "* * * state policies as to rights of aliens to inherit must give way under our Constitution's Supremacy Clause to 'overriding' federal treaties and conflicting arrangements."

For "state law must yield when it is inconsistent with, or impairs the policy or provisions of a treaty, or of *an international compact or agreement.*" *United States v. Pink,* 315 U. S. 203, 231 (1942). (Italics ours.)

The Court also stated in *Pink,* page 233:

> "No state can rewrite our foreign policy to conform to its own domestic policies. Power over external affairs is not shared by the State; it is vested in the national government exclusively * * *."

It is submitted that the decision of the district court fails to conform to the rationale and decision of this Court in *Zschernig* and *Goldstein v. Cox,* and that it authorizes the state courts to engage in activities prohibited by the Constitution of the United States. We believe that the questions presented by this appeal are substantial and that they are of public importance.

Respectfully submitted,

JOHN R. VINTILLA,
Counsel for Appellants.

NOVAK N. MARKU,
Of Counsel.

APPENDIX A.

OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA, HELENA DIVISION.

PER CURIAM:

Plaintiffs, residents of Romania, seek in this three judge federal court to enjoin the enforcement of Revised Codes of Montana, 1947, § 91-520, as amended. The facts which are properly before the court on plaintiffs' motion for summary judgment and the State of Montana's motion to dismiss are: The estate of John Precup Giurgiu, who died June 22, 1966, is being administered in the District Court of Lewis and Clark County. Plaintiffs will inherit from that estate unless prevented by the provisions of R.C.M. 1947, § 91-520, as amended.[1] Plaintiffs claim that

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[1] "*Conditions under which aliens in foreign country may inherit.*

1. No person shall receive money or property, save and except mining property, as provided in section 25, article III, of the constitution of the state of Montana, as an heir, devisee and/or legatee of a deceased person leaving an estate or portion thereof in the state of Montana, if such heir, devisee and/or legatee, at the time of the death of said deceased person, is not a citizen of the United States and is a resident of a foreign country at the time of the death of said intestate or testator, unless, reciprocally, the foreign country in question would permit the transfer to an heir, devisee and/or legatee residing in the United States, of property left by a deceased person in said foreign country.

2. In order to prove reciprocity the alien heir, devisee and/or legatee must establish by competent evidence produced at a hearing to determine heirship; (a) that such foreign country recognizes the right of United States citizens to inherit property left by a deceased person in such foreign country; (b) that such foreign country places no restrictions upon the movement of money or property out of such foreign country to an heir, devisee and/or legatee residing in the United States.

3. If such proof as required by subsection 2 establishes the fact that such foreign country recognizes the right of inheritance, but restricts the movement of money or property out of such

(Continued on following page)

this section is unconstitutional, citing *Zschernig v. Miller*, 389 U. S. 429, and *Goldstein v. Cox*, 389 U. S. 581.

Plaintiffs' motion for a summary judgment is denied and defendants' motion to dismiss is granted, and the proceeding is dismissed.

(Continued from preceding page)

foreign country to an heir, devisee and/or legatee residing in, and a citizen of the United States, then and in that event, the court upon such a determination, shall at the time of final distribution, order the inheritance of such alien heir, devisee and/or legatee distributed to the state treasurer of the state of Montana, in trust for such named heir, devisee and/or legatee, under such conditions and restrictions as are imposed on the movement of money or property by such foreign country in question to an heir, devisee and/or legatee residing in, and a citizen of the United States.

4. In an action for dissolution of the trust so created, the following jurisdictional facts must be set forth in the complaint: (a) the name of the beneficiary of the trust; (b) the foreign country in which the beneficiary has his permanent residence; (c) the conditions and restrictions imposed upon the trust funds by the court in its decree of final distribution; (d) the fact that the beneficiary is in the state of Montana; (e) the verification of the complaint by the beneficiary before an official of the state of Montana authorized by law to administer oaths; (f) that the action has been commenced within the period of three (3) years of the date the trust was created, unless the conditions of the trust declare a shorter or longer period to exist in the country of the foreign heir's residence and that reciprocally such period has been imposed to satisfy the requirements of reciprocity, hereinabove set forth; (g) in the event that the beneficiary is a minor or insane person, his action must be instituted within the period of limitation herein provided for the commencement of the action, by his guardian, duly appointed under the laws of the country of residence of said minor or insane person and the record of such appointment shall be fully exemplified and attested by a duly accredited representative of the state department of the government of the United States of America in such foreign country; (h) unless the action herein provided shall have been commenced within three (3) years, or such shorter or longer period as is specifically declared as a condition of the trust, as hereinabove required, then such trust funds shall forthwith escheat to the state of Montana, and no action can thereafter be instituted in the courts of this state for the recovery of such escheated trust funds.

(Continued on following page)

Applications for injunction under 28 U. S. C. § 2281 are addressed to the sound discretion of the court,[2] and should be granted only when the case is reasonably free from doubt and when necessary to prevent great and irreparable injury.[3] In the application of R.C.M. 1947, § 91-520, as amended, and its predecessors, the Montana Supreme Court has ordered distribution to heirs in occupied Denmark,[4] in Yugoslavia,[5] Czechoslovakia,[6] and to the alien property custodian for Romanian heirs.[7] In the case of the Romanian heirs, evidence as to the Romanian law was taken and reciprocity found. At this stage of the state court proceedings, it cannot be said that the plaintiffs will be injured by the action of the state court, and if they are so injured that injury will be irreparable in view of the appellate power of the Supreme Court of the United States.[8]

For other reasons our discretion is moved to deny application for an injunction. *Zschernig v. Miller, supra.*

(Continued from preceding page)

5. The action provided for under the provisions of subsection 4 hereof shall in all respects comply with the requisites of section 91-518.

6. No estate in which alien heirs, devisees and/or legatees have a distributive share shall be considered to be in a condition to petition for final distribution, unless, the court enters a written order in such estate decreeing that an action for determination of heirship has been instituted in which the state of Montana was made a party-defendant and that a decree determining heirship has been entered and filed in this action." Revised Codes of Montana, 1947, § 91-520.

[2] *Douglas v. Jeanette,* 319 U. S. 157 (1943).

[3] *Mass. State Grange v. Benton,* 272 U. S. 525 (1926).

[4] *In re Nielsen's Estate,* 118 Mont. 304, 165 P. 2d 792 (1945).

[5] *Olsen v. Spoya,* 129 Mont. 83, 282 P. 2d 452 (1955). *In re Estate of Ginn,* 136 Mont. 338, 347 P. 2d 467 (1959).

[6] *Estate of Hosova,* 143 Mont. 74, 387 P. 2d 305 (1963).

[7] *In re Gasper's Estate,* 128 Mont. 383, 275 P. 2d 656 (1954).

[8] See *Zschernig v. Miller,* 389 U. S. 429 (1968).

Clark v. Allen, 331 U. S. 503, sustained the validity of a California reciprocity statute. *Zschernig* did not overrule *Clark v. Allen,* but did hold that an Oregon statute as applied had potential for the disruption or embarrassment of our relations with other countries, intruded upon a federal function and was therefore unconstitutional. It seems clear from *Zschernig* that reciprocity statutes are not unconstitutional per se and that if a state reciprocity statute requires that the state courts do no more than read the law of a foreign nation to determine whether reciprocity exists, then the law does not infringe upon the prerogatives of the federal government. If, on the other hand, state courts find it necessary to engage in the kind of analysis exemplified by *State Land Board v. Pekurek,* 234 Ore. 74, 378 P. 2d 734, and *Estate of Gogabashrele,* 195 Cal. App. 2d 503, 16 Cal. Rptr. 77, to apply a state statute, then the law as applied is unconstitutional.

Were we inclined to think that in interpreting the Montana law the state courts had in some degree trespassed upon areas reserved for federal action, still we would be reluctant at an intermediate stage in the Montana probate proceedings to issue an injunction. At the time the Montana cases were decided foreign law was treated as a question of fact. Now, by virtue of a 1966 amendment to the Montana Rules of Civil Procedure,[9] questions of foreign law are treated as problems in law and decided by the court as such. If there is difficulty, it is not in the statute itself but in the application of it. The change in the Montana procedural law changes the method of the application of R.C.M. 1947, § 91-520. We believe that the Montana court now advised by *Zschernig* of the boundaries of the constitutional power of the state, and equipped

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[9] M. R. Civ. P., Rule 44.1.

with Rule 44.1 of the Montana rules, should be free to fashion a procedure for applying R.C.M. 1947, § 91-520, in a manner not offensive to the Federal Constitution.

JAMES R. BROWNING,
Circuit Judge.

W. D. MURRAY,
District Judge.

RUSSELL E. SMITH,
District Judge.

APPENDIX B.

TITLE 31—MONEY AND FINANCE: TREASURY.

Chapter II—Fiscal Service, Department of the Treasury—Subchapter A—Bureau of Accounts.

Part 211—Delivery of Checks and Warrants to Addresses Outside the United States, Its Territories and Possessions.

Withholding of Delivery on Checks and Warrants.

Part 211, Subchapter A, Chapter II, Title 31, of the Code of Federal Regulations of the United States of America (appearing also as Treasury Department Circular No. 655 dated March 19, 1941, as supplemented) is hereby amended by revising § 211.3 (a) and (b) to read as follows:

§ 211.3 Withholding of delivery on checks and warrants.

(a) The Secretary of the Treasury hereby determines that postal, transportation, or banking facilities in general or local conditions in Albania, Bulgaria, Communist-controlled China, Czechoslovakia, Estonia, Hungary, Latvia, Lithuania, the Union of Soviet Socialist Republics, the Russian Zone of Occupation of Germany, and the Russian

Sector of Occupation of Berlin, Germany, are such that there is not a reasonable assurance that a payee in those areas will actually receive checks or warrants drawn against funds of the United States, or agencies or instrumentalities thereof, and be able to negotiate the same for full value.

TITLE 8—ALIENS AND NATIONALITY.

Chapter II—Office of Alien Property, Department of Justice—Part 511—Blocked Assets.

General License.

Article VI of the Agreement between the United States of America and the Rumanian People's Republic Relating to Financial Questions Between the Two Countries, done at Washington, D. C., on March 30, 1960, provides that the United States will release its blocking controls over all Rumanian property in the United States. The following amendment of General License No. 101 effects such unblocking by deleting references to Rumania and persons within Rumania from subparagraphs (1) and (2) of § 511.101(a). This amendment relieves existing restrictions and does not impose any new requirements on the public and it is hereby found that notice, hearing and suspension of applicability are unnecessary.

APPENDIX C.

COMPLAINT.

Plaintiffs, complaining of the defendants, allege:

1. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1331, and also under Title 28, United States Code, Section 2281, being a suit in equity to challenge the constitutionality of the Montana

"Iron Curtain Act," Section 91-520, and the policy predicated on the authority of such statute, and to enjoin the enforcement of the statute on the ground that it violates the rights secured to the plaintiffs and others similarly situated under the Constitution of the United States, and that the statute infringes upon the exclusive power of the Federal Government over foreign affairs, as hereinafter more fully appears.

2. Section 91-520 of the aforesaid Act of the State of Montana, provides:

> "1. No person shall receive money or property, save and except mining property, as provided in section 25, article III, of the constitution of the state of Montana, as an heir, devisee and/or legatee of a deceased person leaving an estate or portion thereof in the State of Montana, if such heir, devisee and/or legatee, at the time of the death of said deceased person, is not a citizen of the United States and is a resident of a foreign country at the time of the death of said intestate or testator, unless, reciprocally, the foreign country in question would permit the transfer to an heir, devisee and/or legatee residing in the United States, of property left by a deceased person in said foreign country.
>
> 2. In order to prove reciprocity, the alien heir, devisee and/or legatee must establish by competent evidence produced at a hearing to determine heirship; (a) that such foreign country recognizes the right of the United States citizens to inherit property left by a deceased person in such foreign country; (b) that such foreign country places no restrictions upon the movement of money or property out of such foreign country to an heir, devisee and/or legatee residing in the United States.
>
> 3. If such proof as required by subsection 2 establishes the fact that such foreign country recognizes the right of inheritance, but restricts the movement

of money or property out of such foreign country to an heir, devisee and/or legatee residing in, and a citizen of the United States, then and in that event, the court upon such a determination, shall at the time of final destribution, order the inheritance of such alien heir, devisee and/or legatee distributed to the state treasurer of the state of Montana, in trust for such named heir, devisee and/or legatee, under such conditions and restrictions as are imposed on the movement of money or property by such foreign country in question to an heir, devisee and/or legatee residing in, and a citizen of the United States."

3. Plaintiffs are nationals of Romania, and are residents and domiciled in said country. They bring this action on behalf of themselves and all other residents of Romania, similarly situated with respect to the matters here involved. They are so numerous as to make it impracticable to bring them all before the Court. There being identical or same questions of law and fact, a common relief being sought as will hereinafter more fully appear, plaintiffs bring this action as a class suit, pursuant to Rule 23 (a) of the Federal Rules of Civil Procedure.

4. The defendants, Victor H. Fall and Lester H. Loble, are the duly elected, qualified and acting judges of the District Court of the First Judicial District of Montana, In and For Lewis and Clark County, Montana.

5. The defendant, Union Bank and Trust Company of Helena, Montana, has been and is the duly appointed, qualified and acting executor of the estate of John Precup Giurgiu, deceased.

6. Plaintiffs are the sisters of John Precup Giurgiu, who died on June 22, 1966, testate, unmarried and without issue, and whose estate is being administered in the District Court of The First Judicial District of Montana, In and For the County of Lewis and Clark. That there-

after a controversy ensued by these plaintiffs and the State of Montana relative to whether reciprocity of inheritance or reciprocity of transfer existed between the United States and the country of Romania, which said controversy still continues and has not yet been determined, and, that, as a consequence thereof, the defendants have denied and continue to deny the distributive shares belonging to these plaintiffs from the estate of John Precup Giurgiu, deceased, on the authority of Section 91-520 of the law of Montana.

7. That it is the policy and practice of the defendant-judges in the settlement and distribution of a decedent's estate to withhold the payment in full of the distributive share due and owing to a resident of Romania by virtue of Section 91-520 of the law of Montana.

8. On February 19, 1951, the United States Treasury Department, pursuant to the authority vested in it by P.L. No. 828, Section 5, 54 Stat. 1036, 31 U.S.C.A. Section 123, issued Treasury Circular 655, listing twelve countries, including Romania, to which the forwarding of public funds, such as social security benefits and veteran's pensions, was prohibited. The Treasury Department concluded at that time, with respect to checks or warrants drawn against funds of the United States in favor of a Romanian national, that local conditions in Romania were such that there was not a reasonable assurance that a payee in that country would actually receive payment or be able to negotiate the check or warrant for full value, Title 31, Section 211.3 (a).

9. On March 30, 1960, an agreement relating to financial questions was concluded at Washington, D. C., between the governments of the United States and of Romania. By virtue hereof, Romania was removed from the proscribed list of the United States Treasury Department

of countries to which federal funds may not be transmitted, and, furthermore, all federal regulations of a blocking nature regarding Romanian nationals were removed, 31 C.F.R., Section 211.2(a), 25 Federal Regulations, pages 3456, 3526. The present official policy of the United States regarding payment of funds to persons resident in Romania, is set forth in the United States Treasury Regulation 655, as amended in April, 1960, and now declares that there is a reasonable assurance that a payee in that area will actually receive checks or warrants drawn against funds of the United States, and will be able to negotiate them for full value. That ever since April of 1960, the United States has been remitting checks and warrants representing social security benefits, veterans pensions and other public funds to residents in Romania without any problem or difficulty as to the receipt, and use and control thereof by the recipient.

10. The policy of the State of Montana, as applied to the residents of Romania, as hereinabove set forth, encroaches upon and impairs the effective exercise of the power to conduct foreign relations which is constitutionally vested in the Federal Government to the exclusion of the State of Montana.

11. The authoritative conclusion of The Treasury Department of the United States, that a reasonable assurance exists that a payee in Romania will actually receive the funds remitted to him and will be able to negotiate checks or warrants for full value, and the consequent transfer of public funds to residents in Romania since April of 1960, constitutes official Federal policy, and, therefore, the policy of the State of Montana in withholding distribution to heirs, legatees, or beneficiaries in Romania is in direct conflict with and in violation of, and must give way to overriding federal policy.

12. That the aforementioned Act of Montana, Section 91-520, as applied by these defendants to the rights of these plaintiffs, and other residents of Romania, deprives them arbitrarily of their distributive shares, and constitutes an unconstitutional governmental interference without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

13. Defendant-judges have established and are maintaining a policy and practice of denying residents of Romania their distributive shares, otherwise secured to them, solely, because of their place of residence, and that such practice unlawfully discriminates against the plaintiffs and others similarly situated of the equal protection of the laws guaranteed them by the Fourteenth Amendment insofar as the statute is applied only because of their place of residence.

14. The plaintiffs and others similarly situated are in dire need and/or aged and desperately in need of these funds. The plaintiffs, and others similarly situated and affected, on whose behalf this suit is brought, have suffered a denial and deprivation of their rights into an indefinite future by reason of the acts herein complained of. There is no other remedy afforded by law or statute against the illegal acts and conduct of the defendants, save the equity powers of this Court, and unless the relief prayed for is granted.

WHEREFORE, plaintiffs pray that a three judge court be convened, pursuant to Title 28 U.S.C. Section 2281, and for the following relief:

1. That this Court enter a judgment or decree declaring that the policy and practice of the defendant-judges in denying these plaintiffs and others similarly situated the right to their distributive shares in full from dece-

dents' estates and to other funds to which they are entitled by reason of their residence in Romania is a denial of the rights secured to them by the Fourteenth Amendment to the United States Constitution and, therefore, unconstitutional and void.

2. That Section 91-520 of the Law of Montana, as applied by the defendants to the rights of these plaintiffs and others similarly affected, be declared unconstitutional.

3. That this Court issue a permanent injunction forever restraining and enjoining the defendants and each of them, their agents and employees, from denying plaintiffs, and other similarly situated, the right to their distributive shares from decedents' estates, and to other funds to which they may be entitled, that the defendants, and each of them, their agents and employees, be ordered and directed to take such action as shall be necessary to deliver the distributive shares and other funds which are due and owing to and being withheld from the plaintiffs and others similarly situated.

4. That pending the final hearing and determination of this complaint upon its merits, the Court issue a preliminary injunction, restraining the defendants and each of them, their agents and employees, from denying the plaintiffs, and others similarly situated, the right to their distributive shares and other funds to which they may be entitled.

5. For such other and further relief which this Court may deem proper.

JOHN R. VINTILLA,
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Attorneys for Plaintiffs.

(Jurat omitted.)

APPENDIX D.

MOTION FOR SUMMARY JUDGMENT WITH AFFIDAVIT.

Plaintiffs move the court to enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, a summary judgment in plaintiffs' favor for the relief demanded in the complaint on the ground that there is no genuine issue as to any material fact and the plaintiffs are entitled to a judgment as a matter of law, and more particularly, in the light of *Goldstein v. Cox,* 36 L.W. 3285 (1/16/68) and *Zschernig v. Miller,* 36 L.W. 4120 (1/15/68), decided by the Supreme Court of the United States.

The Affidavit of John R. Vintilla is attached hereto in support of this motion.

JOHN R. VINTILLA,
PATRICK F. HOOKS.

AFFIDAVIT IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT.

STATE OF OHIO, CUYAHOGA COUNTY, SS.

JOHN R. VINTILLA, being duly sworn, says:

1. He is chief counsel for the plaintiffs herein.

2. That he has handled and appeared in similar matters in courts throughout the United States wherein the rights of romanian nationals were involved.

3. The propriety and validity of the relief requested in the plaintiffs' complaint herein have been sustained by the recent decision of the Supreme Court of the United States announced on January 15, 1968, in the case of *Goldstein v. Cox,* 36 L. W. 3285, a case which is identical in all respects to the instant cause and which was instituted by your affiant in the United States District Court for the Southern District of New York.

4. According to the decision of the Supreme Court of the United States in *Zschernig v. Miller*, 36 L. W. 4120, decided on the same date as the aforementioned *Goldstein* case, the history and operation of the Montana statute challenged herein, "make clear that (Section 91-520) is an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress." Mr. Justice Douglas, in the majority opinion of the Court in the *Zschernig* case stated, "as one reads the Oregon decisions, it seems clear that foreign policy attitudes, the freezing or thawing of the 'cold war,' and the like are the real desiderata." And, as a footnote to this statement, the opinion of the Court recites: "Such attitudes are not confined to the Oregon courts. Representative samples from other States would include statements in the New York courts, * * *." Another example is a concurring opinion by Justice Doyle in *In re Hosova's Estate*, 143 Mont. 74, 387 P. 2d 305:

> "In this year 1963, the Central Committee of the Communist Party of the U. S. S. R., issued the following directive to all of its member, 'We fully stand for the destruction of imperialism and capitalism. We not only believe in the inevitable destruction of capitalism, but also are doing everything for this to be accomplished by way of the class struggle, and as soon as possible.' "Hence, in affirming this decision the writer is knowingly contributing financial aid to a Communist monolithic satellite, fanatically dedicated to the abolishing of the freedom and liberty of the citizens of this nation. "By reason of self-hypnosis and failure to understand the aims and objective of the international Communist conspiracy, in the year 1946, Montana did not have statutes to estop us from making cash contributions to our own ultimate destruction as a free nation." Id., at 85-86, 387 P. 2d, at 311.

In commenting upon such statements and attitudes of the state courts in their application of the "Iron Curtain" statute, Mr. Justice Douglas further declared: "* * * Yet they, of course, are matters for the Federal Government, not for local probate courts."

5. Mr. Justice Stewart, in a concurring opinion joined by Mr. Justice Brennan, in *Zschernig,* reviewed the provisions of the Oregon "Iron Curtain" statute, which are somewhat similar to the statute here under attack, and commented, as follows: "I believe that all three of the statutory requirements on their face are contrary to the Constitution of the United States. In my view, *each* of the three provisions of the Oregon law suffers from the same fatal infirmity. *All three launch the State upon a prohibited voyage into a domain of exclusively federal competence.* Any realistic attempt to apply any of the three criteria would necessarily involve the Oregon courts in an evaluation, either expressed or implied, of the administration of foreign law, the credibility of foreign diplomatic statements, and the policies of foreign governments. Of course, state courts must routinely construe foreign law in the resolution of controversies properly before them, *but here the courts of Oregon are thrust into these inquiries only because the Oregon legislature has framed its inheritance laws to the prejudice of nations whose policies it disapproves and thus has trespassed upon an area where the Constitution contemplates that only the National Government shall operate.*" (Italics supplied.) A substitution of Montana in the place of Oregon in the foregoing declaration readily reveals that the Montana statute "suffers from the same fatal infirmity."

APPENDIX E.

EXCERPT FROM FEDERAL REGISTER VOLUME 33—NUMBER 123, TUESDAY JUNE 25, 1968, PAGES 9302 AND 9303.

TITLE 31—MONEY AND FINANCE: TREASURY.

Chapter II—Fiscal Service, Department of the Treasury—Subchapter A—Bureau of Accounts.

Part 211—Delivery of Checks and Warrants to Addresses Outside the United States, Its Territories and Possessions.

Withholding of Delivery of Checks.

On the basis of information available to the Secretary of the Treasury, including advice received from the Department of State, the Secretary has determined that postal, transportation and banking facilities in general, and local conditions in Czechoslovakia are such that there is a reasonable assurance that the payee of a check or warrant drawn against funds of the United States, or any agency or instrumentality thereof, will actually receive such a check or warrant and be able to negotiate it for full value. The Treasury Department therefore finds it necessary to amend its regulations at 31 CFR Part 211 (Treasury Department Circular No. 655, as amended) so as to delete Czechoslovakia from the list of restricted areas in § 211.2(a) to which such a check or warrant may not be sent from the United States for delivery. The Department also finds, in accord with 5 U. S. C. 553, that notice and public procedure thereon are not necessary since the amendment involves a foreign affairs function of the United States.

Accordingly, § 211.2(a), Subchapter A, Chapter II of Title 31 of the Code of Federal Regulations is amended to read as follows:

§ 211.2 Withholding of delivery of checks.

(a) It is hereby determined that postal, transportation, or banking facilities in general or local conditions in Albania, Communist-controlled China, Cuba, Estonia, Hungary, Latvia, Lithuania, North Korea, North Viet-Nam, the Union of Soviet Socialist Republics, the Russian Zone of Occupation of Germany, and the Russian Sector of Occupation of Berlin, Germany, are such that there is not a reasonable assurance that a payee in those areas will actually receive checks or warrants drawn against funds of the United States, or agencies or instrumentalities thereof, and be able to negotiate the same for full value.

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 496

MARIA GORUN AND PARASCHIVA GIURGIU,
on behalf of themselves, and all others similarly situated,
Appellants,

vs.

VICTOR H. FALL and LESTER H. LOBLE, et al.,
Appellees.

On Appeal from the United States District Court for the District of Montana

Motion to Affirm

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THURBER'S HELENA

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In the Supreme Court of the United States

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No. 496

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Motion to Affirm

The appellees move under Rule 16, Section 1(c) of the Rules of this Court, to affirm the judgment appealed from, on the ground that it is manifest that the questions on which the decision of this cause depends are so unsubstantial as not to need further argument.

This is a direct appeal, taken September 9, 1968, from a judgment of the United States District Court for the District of Montana, entered August 6, 1968, denying plaintiff's (appellants') motion for a sum-

mary judgment, granting defendants' (appellees') motion to dismiss, and dismissing the proceeding.

STATEMENT OF THE CASE

The appellants sought to enjoin the enforcement of Section 91-520, R.C.M., 1947, as amended as being unconstitutional and sought to invoke jurisdiction under Title 28, United States Code, Section 2281.

The appellants are residents of the country of Romania, and the above quoted Montana statute is a reciprocity statute. The appellants are heirs of an estate being probated in Montana and under the above quoted Montana statute, the appellees have taken the position that the appellants must prove reciprocity of inheritance and reciprocity of transfer of funds in the usual manner before they can receive their inheritance.

ARGUMENT

The entire argument of the appellants is predicated on the decision of this Court in Zschernig v. Miller, 389 U. S. 429 and the far-reaching conclusions drawn by appellants from that decision are unwarranted and unreasonable. The decision of the three judge court, herein appealed from, correctly pointed out that *Zschernig* did not overrule Clark v. Allen, 331 U.S. 503. The Clark v. Allen decision sustained the validity of a California reciprocity statute and held that the challenge to the California statute as being an extension of state power in the

field of foreign affairs as "far fetched". The three judge court correctly held that *Zschernig* does not hold all state reciprocity statutes are unconstitutional per se. As a matter of fact, Mr. Justice Douglas, delivering the opinion for the majority of the Court, states at the outset that "We do not accept the invitation to re-examine our ruling in Clark v. Allen", and he further states in the *Zschernig* opinion:

> "We held in Clark v. Allen that a general reciprocity clause did not on its face intrude on the federal domain."

Throughout the majority opinion in Zschernig, we find numerous references to the fact that the Oregon reciprocity statute is unacceptable to the court "in its application" and in its "history and operation."

An examination of the Montana reciprocity statute on its face shows that it does not contain such a stringent requirement as that contained in the Oregon statute whereby the nonresident alien must prove that he can receive the benefit, use and control of his inheritance without confiscation in whole or in part by the government of the country wherein such foreign heir resides. This, we submit, was an element making the Oregon statute repugnant to this Court "in its application" and one which necessarily resulted in the Oregon statute being "inextricably enmeshed in international affairs and matters of foreign policy." We set out at this point the relevant portions of the Montana Reciprocity statute:

"91-520. Conditions under which aliens in foreign country may inherit.

1. No person shall receive money or property, save and except mining property, as provided by section 25, Article III, of the Constitution of the State of Montana, as an heir, devisee and/or legatee of a deceased person leaving an estate or portion thereof in the State of Montana, if such heir, devisee and/or legatee, at the time of the death of said deceased person, is not a citizen of the United States and is a resident of a foreign country at the time of the death of said intestate or testator, unless, reciprocally, the foreign country in question would permit the transfer to an heir, devisee and/or legatee residing in the United States, of property left by a deceased person in said foreign country.

2. In order to prove reciprocity the alien heir, devisee and/or legatee must establish by competent evidence produced at a hearing to determine heirship; (a) that such foreign country recognizes the right of United States citizens to inherit property left by a deceased person in such foreign country; (b) that such foreign country places no restrictions upon the movement of money or property out of such foreign country to an heir, devisee and/or legatee residing in the United States.

3. If such proof as required by subsection 2 establishes the fact that such foreign country recognizes the right of inheritance, but restricts the movement of money or property out of such foreign country to an heir, devisee and/or legatee residing in, and a citizen of the United

States, then and in that event, the court upon such a determination, shall at the time of final distribution, order the inheritance of such alien heir, devisee and/or legatee distributed to the state treasurer of the State of Montana, in trust for such named heir, devisee and/or legatee, under such conditions and restrictions as are imposed on the movement of money or property by such foreign country in question to an heir, devisee and/or legatee residing in, and a citizen of the United States. . . . . ."

The first section of the Montana act was enacted as Chapter 104, Laws of 1939 and the very date of the enactment shows that it was not a move dictated by stress of war nor was it an attempt at confiscation or rettaliation against actual or potential enemies. No statement of urgency accompanied its passage and it did not aim to govern or affect the foreign policy of the United States. As amended, the Montana reciprocity statute is comparable to the California reciprocity statute which received the Constitutional approval of this Court in Clark v. Allen, supra. As this Court did not rule in *Zschernig* that all state reciprocity statutes are unconstitutional per se, we feel that the constitutional issue is answered. Consequently we need deal only with whether the enforcement of the Montana reciprocity law adversely affects the power of the federal government or unduly invades the field of foreign affairs. We contend it does not. In this connection it is most significant that the majority opinion of this Court in *Zschernig*

admits that the Department of Justice in its amicus brief had definitely stated that the federal government does not contend that the application of the Oregon escheat statute unduly interferes with the conduct of foreign affairs. This is likewise true in the case of the Montana statute.

The three judge court below has cited various cases showing that the Montana Supreme Court, in applying the Montana reciprocity statute, has ordered distribution to heirs in the countries of Denmark, (In re Nielsen's Estate, 118 Mont. 304, 165 P. 2d 792; 1945); Yugoslavia, (Olsen v. Spoya, 129 Mont. 83, 282 P. 2d 452; 1955); (In re Estate of Ginn, 136 Mont. 338, 347 P. 2d 467, 1959); Czechoslovakia, (Estate of Hosava, 143 Mont. 74, 387 P. 2d 305; 1963) and to the alien property custodian for Romanian heirs (In re Gaspar's Estate, 128 Mont. 383, 275 P. 2d 656, 1954). The lower court correctly concluded that no irreparable injury can be reasonably claimed by the Romanian heirs here especially in view of these developments.

Another cogent reason for the lower court conclusion was pointed out in the opinion. The lower court cited the Montana Rules of Civil Procedure and a 1966 amendment thereto which is found in Rule 44.1 and by virtue of which questions of foreign law are treated as problems of law and are to be decided by the court as such. The lower court correctly concluded that the Montana Courts, now advised by *Zschernig* (supra)

and equipped with Rule 44.1 of the Montana Rules of Civil Procedure, should be free to apply the Montana escheat statute in a manner not offensive to the Federal constitution.

This leaves but one further point to be commented on. Appellants make much of the fact that Romania has been removed from the Treasury List (Circular 655, 31 C.F.R. 211.3) of countries whose local conditions are such that there was not a reasonable assurance that checks or warrants drawn against funds of the United States could be negotiated for full value by payees in Romania. This regulation concerns government warrants and it should be pointed out that even while Romania was included in that list, still various states distributed inheritances to Romanian citizens. (Gaspar's Estate, 128 Mont. 383, 275 P. 2d 656, 1954). Whether a country is so listed or not has not been the deciding factor as to whether state reciprocity statutes could be applied. Our national government or State Department has never so contended. The simple fact of the matter is that our State Department can at any time guarantee inheritance rights to Romanians by entering into a simple formal treaty with Romania. Why has that not been done many years ago? Simply, because it has been our obvious foreign policy to carry on relations without such a treaty with Romania for reasons best known only to our State Department.

CONCLUSION

It is manifest that all state reciprocity statutes have not been ruled unconstitutional per se. Consequently the questions raised on this appeal are so unsubstantial as not to need further argument. The Motion to Affirm should be granted and the appeal dismissed on the ground that as stated by the three judge court—

> " . . . . the Montana Court now advised by *Zschernig* of the boundaries of the constitutional power of the state, and equipped with Rule 44.1 of the Montana rules, should be free to fashion a procedure for applying R.C.M. 1947, §91-520, in a manner not offensive to the Federal Constitution. . . . . "

Respectfully submitted,

Attorney General for the State of Montana

Special Assistant Attorney General

Counsel for Appellees

SUPREME COURT, U. S.

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In the Supreme Court of the United States

October Term, 1968.
No. 496

MARIA GORUN and PARASCHIVA GIURGIU, on behalf of themselves, and all others similarly situated,

Appellants,

vs.

VICTOR H. FALL, LESTER H. LOBLE, STATE TREASURER OF MONTANA, and UNION BANK AND TRUST COMPANY, Helena, Montana,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA

RESPONSE OF APPELLEE, UNION BANK AND TRUST COMPANY, HELENA, MONTANA

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HELENA, MONTANA

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In the Supreme Court of the United States

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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA

RESPONSE OF APPELLEE, UNION BANK AND TRUST COMPANY, HELENA, MONTANA

REASON FOR FORM OF EXECUTOR'S RESPONSE

This appellee, Union Bank and Trust Company, Helena, Montana, is the executor named in the Last Will and Testament herein. The reason for the form of this response is that said appellee executor takes the position said will is valid and should be carried out according to its terms. Hence, a motion to dismiss or affirm would not be appropriate, the court below having in effect upheld the validity of the Montana reciprocity statute, which could defeat the provisions of the will, as regards taking by the Romanian beneficiaries.

This appellee was requested by letter dated November 18, 1968, from the office of the Clerk of this Court, to file a "response," and after consultation with

personnel of this Court by telephone, this form of response seems appropriate.

The Court should also be advised that counsel for this appellee will not appear and argue this case, unless ordered to do so by the Court, since counsel for the Romanian heirs have specifically requested that we do not travel to Washington, D.C., and argue, because of the expense which the estate would thereby incur. The Court should be further advised that none of counsel for the appellee executor are admitted to practice before this Court, and that this response is made and filed at the specific request of this Court.

QUESTION PRESENTED

So far as this appellee can see, the single question here presented is whether Section 91-520, Revised Codes of Montana, 1947, as amended, is unconstitutional.

STATUTES INVOLVED

Section 91-520, Revised Codes of Montana, 1947, as amended.

STATEMENT

The sole obstacle, if any, to inheritance by the Romanian beneficiaries of this will is the above-mentioned Section 91-520, Revised Codes of Montana, 1947, as amended.

This appellee executor was named as defendant for procedural reasons, and has never taken the position that said Montana statute is operative to defeat the dispositive provisions of the will. On the contrary, it is the position of said executor that the state statute is unconstitutional, and in the court below this appellee in effect joined in the appellants' motion for sum-

mary judgment by specifically not resisting said motion and filing a brief stating its reasons therefor, and taking the same position at the hearing on said motion.

THE MONTANA STATUTE IS UNCONSTITUTIONAL

Montana Code Section 91-520 is certainly unconstitutional under the rationale and decision of this Court in *Zschernig v. Miller*, 389 U.S. 429, and *Goldstein v. Cox*, 389 U.S. 581. There is no material difference between the Montana statute and the other state statutes considered in those cases. The Montana statute purports to forbid inheritance by residents of foreign countries unless such residents carry the burden of proving that reciprocity of inheritance and movement of money or property from the country of residence to the United States exists in the country of residence.

The position of this appellee is simply that *Zschernig* and *Goldstein* have in effect declared the unconstitutionality of all such state statutes on the ground that they contain such provisions, which are an unconstitutional invasion of the Federal prerogative.

We have been advised by counsel for appellants that this position will be fully presented and argued by them, and we therefore feel that any further elucidation by this appellee would be redundant; unless, of course, we are ordered to appear and argue in this cause, in which event we would desire the privilege of filing appropriate brief or briefs.

Respectfully submitted,
LOBLE, PICOTTE & LOBLE

By.....
Counsel for the Appellee, Union Bank and Trust Company, Helena, Montana.

SUPREME COURT OF THE UNITED STATES

October Term, 1968.

GORUN ET AL. *v.* FALL ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA.

No. 496. Decided January 20, 1969.

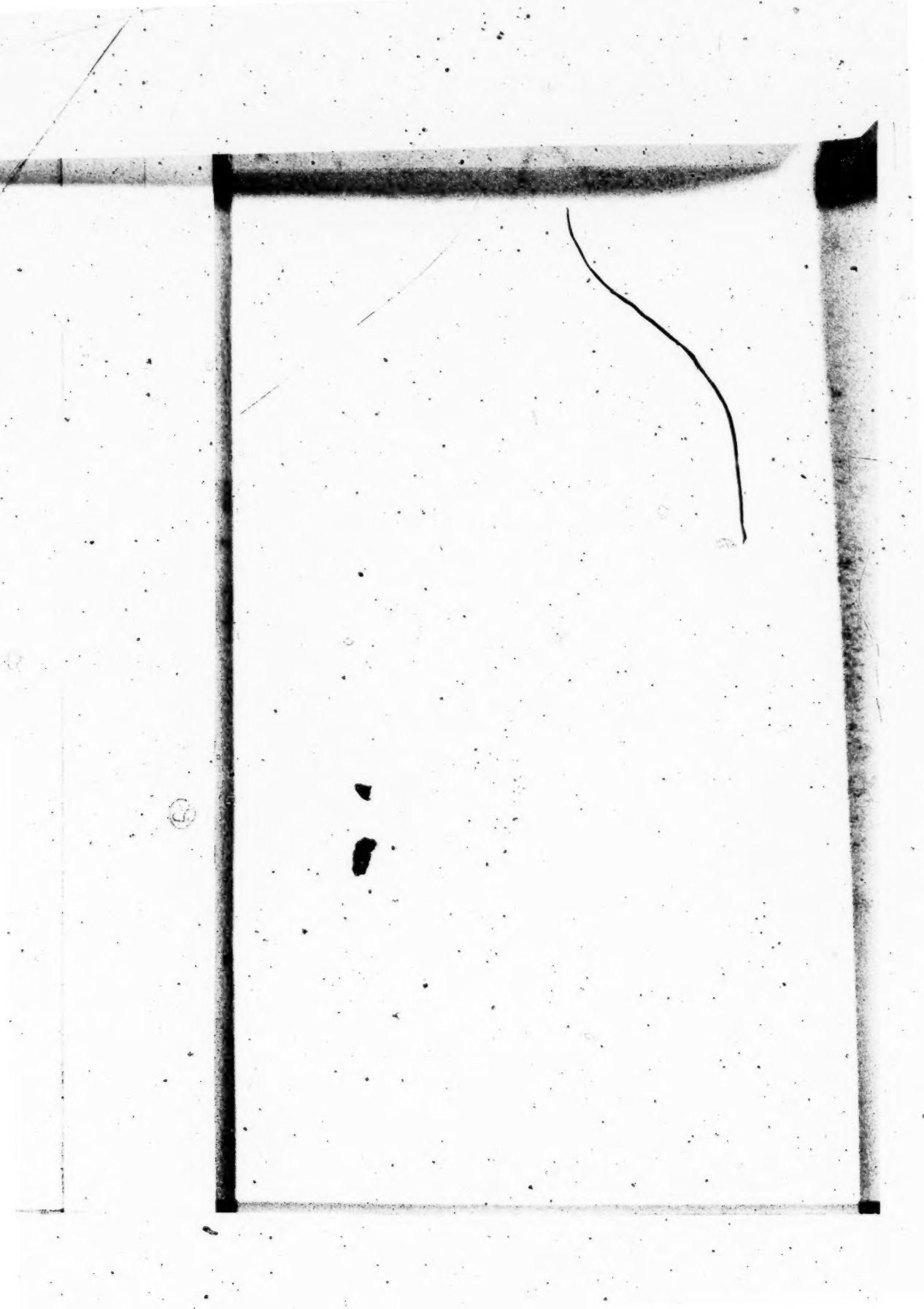
PER CURIAM.

The motion to affirm is granted and the judgment is affirmed.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK, MR. JUSTICE HARLAN, and MR. JUSTICE FORTAS concur.

Appellants are nonresident aliens living in Romania who were named as beneficiaries of an estate being probated in Montana. It has been assumed for the purpose of this appeal that they will receive from that estate unless prevented by the Montana reciprocal inheritance statute (Mont. Rev. Codes § 91–520) which would condition their distribution upon a showing that Romania similarly allows citizens of this country to receive, and to enjoy here, property bequeathed in Romania. While the estate was being administered in the state courts of Montana, appellants filed this complaint to have the three-judge court declare the statute unconstitutional and to enjoin its application. After issue was joined, they moved for summary judgment on the authority of *Zschernig* v. *Miller,* 389 U. S. 429, in which we struck down the Oregon reciprocal inheritance statute as an impermissible interference with federal power over foreign affairs.

Federal policy permits the free flow of funds to Romania. On March 30, 1960, we entered into an agreement with Romania, by which we agreed to release all



blocked assets belonging to Romania. See 25 Fed. Reg. 3458.

At the same time, Romania was removed from the list of countries to which the sending of public funds is prohibited. See 25 Fed. Reg. 3526; 31 CFR § 211.2. As our opinion in *Zschernig* makes clear, a state probate judge is not authorized to make or apply a probate rule contrary to that federal policy.

The three-judge court dismissed the complaint, saying: "[T]he Montana court now advised by *Zschernig* of the boundary of the constitutional power of the state . . . should feel free to fashion a procedure for applying § 91–520 in a manner not offensive to the Federal Constitution."

While the four of us have no objection to summary disposition of this appeal, dismissal seems singularly inappropriate in light of our recent decisions saying over and again that a federal claim in a federal court should be decided by the federal court and not relegated to a state tribunal. See *Zwickler* v. *Koota*, 389 U. S. 241, 250–252. In spite of our aversion to abstention, see *id.*, *Dombrowski* v. *Pfister*, 380 U. S. 479, 486–487, it would be better judicial administration to hold the federal case, pending resolution of the state proceeding, than to dismiss it in the face of clear-cut federal policy in favor of the claim of appellants. Cf. *Kaiser Steel Corp.* v. *Ranch Co.*, 390 U. S. 593.